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IN THE

Supreme Court of the United States

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October Term, 1971
No. 71-898

NORTHERN CALIFORNIA COLLECTION SERVICE, INC. OF SACRAMENTO,

Petitioner,

vs.

JOSEPH A. RANDONE, *et al.*, and the APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE COUNTY OF SACRAMENTO,

Respondents.

Brief of Amicus Curiae in Support of Petition For a Writ of Certiorari to the California Supreme Court.

GEORGE R. RICHTER, JR., ESQ.,
of
SHEPPARD, MULLIN, RICHTER & HAMPTON,
458 South Spring Street,
Suite 600,
Los Angeles, Calif. 90013,
Attorneys for Amicus Curiae California Loan and Finance Association.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Brief of Amicus Curiae in Support of Petition For a Writ of Certiorari to the California Supreme Court.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

I.

Introductory Statement.

This Brief is submitted for filing by the California Loan and Finance Association as *Amicus Curiae* pursuant to Rule 42(1) of the Rules of the United States Supreme Court. All parties of record herein have consented to the filing of this Brief as is indicated by the Stipulation filed concurrently herewith. The Brief has been served on all parties of record herein.

The California Loan and Finance Association (herein "Association" or "Amicus") is a trade association con-

sisting of licensees under the Personal Property Broker's Law in California. (Cal. Fin. Code §§ 22000 *et seq.*) It is a non-profit corporation incorporated August 24, 1940, with a membership of eighty-four consumer finance companies operating 1,602 member offices throughout the State of California. The majority of the members of the Association are engaged in the dual business of making direct consumer loans and purchasing consumer sales finance contracts written pursuant to the Retail Installment Sales Act (the Unruh Act, Civil Code §§ 1801 *et seq.*) and the Automobile Sales Finance Act (the Rees-Levering Act, Civil Code §§ 2981 *et seq.*). In addition, some members of the Association are engaged in the business of accounts receivable financing, retail and wholesale inventory flooring and consumer leasing.

Before the decision of the California Supreme Court in *Randone v. Appellate Department*, 5 Cal. 3d 536 (1971) (hereafter cited as "*Randone*"), the members of the Association made use of the remedy of attachment whenever that remedy was permitted by the provisions of the California attachment statute (C.C.P. §§ 537 *et seq.*).

The Association is familiar with the questions and issues involved in the *Randone* case having filed with leave of the California Supreme Court an *Amicus* Brief in that Court. The Association has read the "Petition For A Writ Of Certiorari" filed by the Northern California Collection Service, Inc. That Petition clearly illustrates the national importance of the issues involved in the *Randone* case and the conflict between and among the federal and state courts on the proper res-

olution of those issues in light of this Court's decision in *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969) (hereinafter cited as "*Sniadach*").

The Association feels that additional argument in support of the Petition For a Writ of Certiorari is needed concerning the widespread confusion that has been and will be fostered by the reasoning and the holding of the California Supreme Court in the *Randone* case. For this reason, the Association wishes to file this Brief as *Amicus Curiae* in support of the Petition For a Writ of Certiorari.

II.

Statement of the Case.

The Petition For a Writ Of Certiorari sets forth the facts underlying the Respondents' assault upon the California attachment statute. Petition For a Writ of Certiorari at pp. 4-6.

One fact should be noted and emphasized here. The Respondents did not premise their constitutional attack upon any showing that the money in the attached bank account was at one time wages or unemployment insurance benefits or necessary to support Respondents' family. Instead, Respondents filed a motion to dissolve the attachment upon the broad sweeping grounds that the mere issuance of a writ of attachment violates due process.

Respondents did not file any affidavits in support of the motion and did not offer any testimony or evidence in support thereof. Instead, they merely cited *Sniadach* contending that all attachments of bank accounts are unconstitutional and C.C.P. § 537(1) is unconstitutional on its face.

Thus, the record before the California Supreme Court was completely barren of any facts to reveal the

source of the money in the bank account, the uses to which it was put or the effect or possible effect of the attachment upon Respondents. Of necessity, the Court was ruling in a vacuum concerning hypothetical applications of the statute without being assisted by a concrete presentation of facts to support the Respondents' challenge. The Court felt compelled by this Court's decision in *Sniadach* to adopt this approach and to entertain and sustain Respondents' due process attack upon the statute.

III.

The Petition For a Writ of Certiorari Should Be Granted Because of the Widespread Confusion That Has Been and Will Be Fostered by the Reasoning and the Holding of the California Supreme Court in the Randone Case.

The California Supreme Court felt compelled by this Court's decision in *Sniadach* to ignore settled rules applicable to a due process attack upon the validity of a state statute. The Court relied upon *Sniadach* to invalidate a century old California statute even though there was no evidence in the record to demonstrate how the statute is used or the effect upon the Respondents of the particular use in this case.

In holding the statute unconstitutional, the California Supreme Court has cast grave doubt and uncertainty upon the basis of this Court's ruling in the *Sniadach* case. It is submitted that the Court completely misread and misapplied this Court's holding in *Sniadach*. The Court also failed to give proper effect to the substantial public policy considerations supporting the California attachment statute.

A. The California Supreme Court Relied Upon Sniadach to Ignore Settled Rules Applicable to a Constitutional Attack Upon a State Statute.

It has long been established by decisions of this Court that in ruling upon the constitutionality of a federal or state statute, a court should: (1) never frame a rule of constitutional law broader than is required by the precise factual requirements presented to it in the record of the case; and (2) never hold all or a portion of a statute unconstitutional unless the facts in the record clearly demonstrate the petitioner's right to relief and all affected parties have been accorded a right to be heard. *See United States v. Raines,* 362 U.S. 17 (1960); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461-62 (1945); *Liverpool N.Y. & P.S.S.Co. v. Emigration Comrs.,* 113 U.S. 33, 39 (1885). These principles of appellate review were succinctly reviewed by Mr. Justice Frankfurter in his separate dissenting opinion in the case of *Staub v. Baxley,* 355 U.S. 313, 330-31 (1958):

> "Even though its action may result in the disadvantages and embarrassments of keeping open doubtful questions of constitutionality, this Court will consider only those very limited aspects of a statute that alone may affect the rights of a particular litigant before the Court. . . . A statute may be found invalid in some of its parts but valid in others, . . .; it may be valid at one time and not another, . . .; it may be valid under one state of facts but not another, . . .; it may be valid as to one class of persons and invalid as to others. . . . It is because the exercise of the right to declare a law unconstitutional is 'the most important and delicate duty of this court,' and be-

> cause that right 'is not given to [the Court] . . . as a body with revisory power over the action of Congress,' . . . nor it may be added, over the action of the forty-eight States, that this Court has from the beginning demanded of litigants that they show in precisely what way and to what extent incursions have been made into their federally protected rights and rules have been developed designed to narrow as closely as possible the issues presented by such claims."

In this case, the record before the California Supreme Court consisted of nothing more than Respondents' claim that the attachment of their bank account was unconstitutional because of this Court's ruling in the *Sniadach* case. The Respondents did not attempt to demonstrate "in precisely what way and to what extent incursions have been made into their federally protected rights." Respondents did not even allege, much less prove, facts to show how they have been injured by the attachment or how it has affected them.

The California Supreme Court, acting under what it felt to be the mandate of the *Sniadach* decision, ignored the important constitutional principles set forth above and entertained the Respondents' request that the California Supreme Court: (1) "reconcile the various opinions that have been written since *Sniadach* was decided" and "systematically define the limits of *Sniadach*", Petition For Hearing In The California Supreme Court, p. 8, lines 5-7, and (2) "sets forth guidelines of procedural due process and put to rest the widespread doubt as to the validity of attachment and summary remedies like it." Petition for Hearing In The California Supreme Court, p. 5, lines 11-14.

The Court did not carefully frame a rule of constitutional law consistent with the precise factual requirements of the case. Instead, the Court relied upon *Sniadach* to frame a rule of constitutional law broad enough to invalidate the challenged statute without reference to a single fact concerning how the statute operates or is used by creditors.

It is respectfully submitted that this Court's decision in *Sniadach* does not dictate or justify such an obvious disregard of established rules of constitutional review. The Petition For a Writ of Certiorari should therefore be granted to correct this error on the part of the Court below.

B. The Decision Below Represents a Patently Erroneous Interpretation of This Court's Holding in the Sniadach Case.

It is respectfully submitted that the determination of whether the attachment of Respondents' bank account pursuant to California's attachment statute violates due process requirements depends upon a careful weighing and balancing of the various interests involved in the lawsuit including the interests of the creditor, the debtor, and the State. *E.g., Ewing v. Mytinger & Cassellberry, Inc.*, 339 U.S. 594 (1950); *Yakus v. United States*, 321 U.S. 414, 439 (1944); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

This Court in *Sniadach* recognized the validity of this approach, both by referring to *Ewing v. Mytinger & Cassellberry, Inc., supra*, and other decisions in which it was applied, and by employing that test in reaching its decision. The opinion lists a number of grounds

which cumulatively rendered the Wisconsin wage garnishment statute violative of due process:

(1) The Wisconsin statute permitted garnishment of assets without notice and hearing prior to the levy;

(2) The levy deprived the debtor of his enjoyment of the assets;

(3) Even after the levy the debtor could not obtain release of the levy, unless trial on the merits was had and the debtor won;

(4) The assets consisted of wages, "a specialized type of property presenting distinct problems in our economic system";

(5) The hardship imposed by wage garnishments is in most cases devastating since it often results in the loss of a job and "may as a practical matter drive a wage-earning family to the wall";

(6) The state had a very paltry exemption statute; and

(7) No situation calling for the protection of the creditor was presented by the facts.

In view of the totality of these aggravating conditions, the absence of notice and hearing prior to the levy was held to be fatal in that case. The Court was particularly impressed with testimony presented in Congressional investigations and other evidentiary material which established the severe hardship which wage garnishments commonly inflict upon wage earners. That evidence showed that, because wages commonly constitute virtually the only asset of the wage earner, garnishment of a substantial portion thereof has often left the wage earner with insufficient assets to support himself and his family, and has frequently resulted in

his loss of employment and in his going into bankruptcy.

However, this Court was careful to point out in the *Sniadach* decision that a summary attachment procedure could meet due process requirements in other factual contexts but found "no situation requiring special protection to a state or creditor interest" in the case of wage garnishments under the Wisconsin law. 395 U.S. at 339.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this court adopted the *Sniadach* approach in deciding whether a state that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

After reviewing all of the facts and weighing all of the various interests involved in the action, this Court held that procedural due process under the Fourteenth Amendment requires that welfare recipients be afforded an evidentiary hearing before the termination of benefits by welfare authorities. Particular emphasis was again placed upon evidence concerning the "brutal need" of the individual for welfare benefits and his plight when those benefits are terminated without a hearing:

> "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks in-

> dependent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." 397 U.S. at 264 (emphasis original).

A similar method of analysis was employed by this Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which involved a successful challenge of a state procedure which denied to indigents access to the courts to bring divorce actions except upon payment of court fees and service of process fees. *See also Bell v. Burson*, ... U.S. ....., 29 L.Ed. 2d 90 (1971).

As noted above, in *Randone* there was absolutely no evidence offered by the Respondents concerning the hardship imposed upon them as a result of the subject attachment. Nor was there any evidence that was offered concerning the hardship that may result, or usually results, from the creditor's use of the attachment statute. The California Supreme Court nevertheless relied upon *Sniadach* to hold the statute unconstitutional on its face without any such evidentiary showing.

The Court held that this Court's ruling in *Sniadach* prescribes a general rule of invalidity for prejudgment creditor remedies such as attachment and that this rule is applicable across the board without reference to any particular showing of hardship, abuse or necessity. Although the Court recognized that attachment may be justified "in extraordinary situations", it is obvious that the extraordinary situations which the Court was referring to were limited to seizures undertaken to benefit the general public "rather than to serve the interests of a private individual or a single class of individuals." 5 Cal. 3d at 554.

Because of the complete void in the factual development of the case, the Court was unable to apply the established due process test described above but instead was forced to reach its result through a strained and expansive reading of the *Sniadach* holding.

The Court's distorted reading of *Sniadach* is especially apparent at page 562 of the *Randone* opinion where the Court states that the constitution absolutely prohibits any seizure of property in the nature of "necessities" until *after* judgment on the merits in the action. According to the Court, *Sniadach* prohibits a creditor from levying upon the debtor's property even *after* notice and hearing on the probable validity of the creditor's claim if the property falls into the amorphous category of "necessities."

It is respectfully submitted that the *Sniadach* case does not summarily invalidate all prehearing and prejudgment creditor remedies. Nor does it dispose of the necessity to carefully examine each challenged statute in the light of its effect upon the debtor and the interests of the debtor, the creditor and the state. In the next section of this Brief, Amicus will briefly mention some of the compelling state and creditor interests which support the California attachment statute.

The decision of the California Supreme Court in *Randone* has clearly misinterpreted the *Sniadach* holding and has given it an application wholly inconsistent with its plain language and meaning. If the California Supreme Court's interpretation of the *Sniadach* case is allowed to stand, there is virtually no prejudgment creditor remedy in California that will withstand an attack premised upon the *Sniadach* case. Already the *Randone* case has prompted a host of attacks in Cali-

fornia upon a variety of creditor remedies including corporate receiverships, mechanic's and materialmen's liens and even private and peaceful repossession of property pursuant to Article 9 of the Uniform Commercial Code.

The Petition For a Writ of Certiorari to the California Supreme Court should therefore be granted so that the courts are guided by a proper application of constitutional principles in ruling upon the validity of these statutes.

C. The California Supreme Court Failed to Give Proper Effect to the Substantial Public Policy Considerations in Support of the California Attachment Statute.

Amicus submits that there are strong public policy considerations in support of the California attachment statute which were not properly recognized by the California Supreme Court because of its misinterpretation of this Court's holding in the *Sniadach* case.

First, the enactment of the California attachment statute over one hundred years ago reflects the strong public policy of the State of California in favor of the enforcement of lawful obligations and the payment of just claims. The statute provides an unsecured creditor with a means of being assured that if a lawsuit is prosecuted it will not be an idle, expensive and time-consuming endeavor because of the debtor's interim dissipation or secretion of all of his assets. In *American Industrial Sales Corp. v. Airscope, Inc.*, 44 Cal. 2d 393, 398 (1955) the California Supreme Court expressed that policy as follows:

> "One of the purposes of attachment is to afford the creditor security for the payment of unsecured debts and to prevent the debtor's sequestration of

> funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims." 44 Cal. 2d at 398.

In *Halstead v. Halstead*, 72 Cal. App. 2d 832, 836 (1946) the Court held:

> "The usual and main purpose of an attachment is to secure and insure the payment of any judgment that may be recovered in the successful prosecution of an action. As early as 1851 the second Legislature assembled in California saw fit to enact into law, and to grant to unsecured creditors whose demands arose from contracts, the provisional and summary remedy known as 'attachment' proceedings in order to insure that the ends of successful litigation should not be fruitlessly pursued or frustrated."

This policy is particularly appropriate in the case of bank account attachments because of the ease with which the funds may be, and customarily are, dissipated where a dispute presages an impending lawsuit. Any required advance notice of the attachment would virtually eliminate bank accounts as a source of security for the repayment of just debts.

The following are just a few examples of the many ways in which the remedy of attachment has been employed under the California attachment statute. In each of the cases, a strong creditor or state interest is served which meets the due process standards discussed above and employed by the Court in the *Sniadach* case.

1. Attachment of property in a business or commercial context involving the competing interests of

business concerns such as where the debtor has, or is about to, consummate a bulk transfer (U.C.C. §§6101 *et seq.*) or a fraudulent transfer (Civ. Code §3440) or where the debtor has wrongfully or fraudulently acquired or converted property.

2. Attachment when the debtor is not a resident of California. In many cases, attachment of property is the only means by which the creditor can acquire quasi in rem jurisdiction necessary to the commencement of the lawsuit. If the debtor incurs an obligation in California and then leaves the State, attachment may be the only means by which the California creditor can enforce the debt.

3. Attachment of property when the debtor has concealed himself or absconded so that the ordinary process of law cannot be served upon him.

4. Attachment of property where the debtor is about to remove his property or effects out of the territory or where the debtor has fraudulently concealed, transferred or disposed of his assets.

5. Attachment of property in connection with actions for support and maintenance where the attached property may provide the only means by which the plaintiff may be assured of a source of funds to live on or supply the necessities of life.

6. Attachment of property to provide security for the payment of tax claims owing to the state or its political subdivisions.

Many of the above examples of the use of the attachment statute were approved by this Court in *Sniadach* through the citation of such cases as *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928), *Fahey v. Mallowee*,

332 U.S. 245 (1947) and *Owenby v. Morgan*, 256 U.S. 94 (1939).

While the above list is not exhaustive, it demonstrates the variety of ways in which attachment can be utilized and it also demonstrates the need to confine any decision regarding attachment to the precise application of the statute as presented in the facts of the case under decision.

A second important policy consideration in connection with the attachment statute is the fact that total invalidation of the statute would inevitably result in a very substantial restriction in credit to many debtors. Credit is extended upon the basis of the debtor's demonstrated ability to repay the debt and upon the creditor's security for repayment. Wholesale invalidation of the attachment statute will force creditors to rely upon the debtor's demonstrated ability to repay the debt. This will result in credit becoming unavailable to high-risk debtors, many of whom will be forced to obtain credit from other sources through the payment of premiums in the form of higher prices and possibly illegal rates.

A third policy consideration is the vast array of safeguards for debtors which the California legislature has built into the California attachment statute. These include: (1) the complete exemption from attachment of all wages and earnings of the debtor (C.C.P. §690.6), unpaid governmental benefits such as workmen's compensation benefits (C.C.P. §690.15), unemployment compensation benefits (C.C.P. §690.175) and welfare benefits (C.C.P. §690.19); (2) the bond and undertaking required to protect the defendant against any loss resulting from the attachment if it is wrongful. (C.C.P. §539); (3) the host of exemptions available to

the defendant all of which are designed to avoid hardship to the defendant from the attachment and are construed liberally in favor of the defendant (C.C.P. §§690 *et seq.*); (4) the right granted to the defendant to immediately contest the attachment either on statutory or constitutional grounds through a motion to dissolve the attachment (C.C.P. §556); (5) the right granted to a defendant to secure a discharge of the attachment upon posting an undertaking (C.C.P. §§554, 555); and (6) the severe penalties and damages that are assessed upon a creditor who misuses the remedy.

In passing upon the validity of the attachment statute, these substantial public policy considerations should be weighed against the hardship imposed, or likely to be imposed, upon the debtor by the particular use of the statute in a given case. This was obviously not done by the California Supreme Court in the *Randone* case because of the absence of any testimony or evidence to support the Respondents' attack and because of the Court's erroneous interpretation of the holding in *Sniadach*.

IV.

Conclusion.

It is no secret that since this Court's decision in *Sniadach* a host of cases have been filed in federal and state courts throughout the United States attacking the validity of attachment statutes. A list of some of those cases is set forth in the Petition For A Writ Of Certiorari filed herein. Undoubtedly, the list has grown and will continue to grow as cases such as *Randone* are decided.

Not surprisingly, the decided cases have reached conflicting results concerning the basis for this Court's

holding in the *Sniadach* case. Some limit the holding to wages while others such as *Randone* give it the broadest and most expansive meaning and application.

It is submitted that the Due Process Clause still requires the type of balancing of interest which was employed by this Court in the *Sniadach* case. And, a party challenging a statute under the Due Process Clause is still required to present facts to demonstrate the type of hardship and injury which is imposed by the statute.

In striking down the century old California attachment statute, the Court in *Randone* failed to follow established rules of constitutional review and failed to apply the Due Process test which has been carefully developed by this Court. Both the reasoning and the holding of the California Supreme Court have generated uncertainty and confusion as to the basis for this Court's decision in *Sniadach* and how that decision affects long standing creditor remedies such as attachment.

It is respectfully submitted that the Petition For a Writ Of Certiorari to the California Supreme Court should therefore be granted.

Dated: February 18, 1972.

SHEPPARD, MULLIN, RICHTER & HAMPTON,
GEORGE R. RICHTER, JR.,
WILLIAM M. BURKE,
By GEORGE R. RICHTER, JR.,
Attorneys for the California Loan and Financial Association.